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No. 87-1740

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SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

JOSEPH P. POLLIO,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

RESPONDENT'S BRIEF IN OPPOSITION

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July 27, 1988



QUESTIONS PRESENTED FOR REVIEW

1. Does this Court have *certiorari* jurisdiction pursuant to 28 U.S.C. sec. 1257(3) to review a fact-sensitive state court decision that is merely a correct application of a state court rule in a case where no federal constitutional claims were ever squarely presented or decided?

2. Assuming that a federal constitutional claim was raised in the state courts, is the federal constitutional right to a trial by an impartial jury, guaranteed by the Sixth Amendment, offended when a state court judge properly discharges a deliberating juror, substitutes an undischarged alternate after ascertaining that the alternate had not discussed the case, and instructs the reconstituted jury to set aside prior deliberations, begin deliberations anew and disregard any impact of the discharged juror?

PARTIES BELOW

All parties below are parties to this petition.

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STATE OF NEW JERSEY,

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On Petition For Writ Of Certiorari To The
Superior Court Of New Jersey,
Appellate Division

RESPONDENT'S BRIEF IN OPPOSITION

The respondent State of New Jersey respectfully requests that this Court deny the petition for writ of *certiorari*, seeking review of the opinion of the Superior Court of New Jersey, Appellate Division, in this case. That opinion has not been reported and is reprinted in the appendix to the petition at pp. 1 to 3.

OPINIONS BELOW

Respondent concurs with the statements set forth in the petition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 *U.S.C.* sec. 1257(3). (Pet. 2). However, because the state court judgment to which *certiorari* is sought did not decide that case on the basis of a claimed federal constitutional right, 28 *U.S.C.* sec. 1257(3) cannot be invoked to confer jurisdiction on this Court.

STATUTE INVOLVED

28 *U.S.C.* sec. 1257. State courts; appeal; *certiorari*

Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

• • •

(3) By writ of *certiorari*, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

STATEMENT OF THE CASE

Petitioner was indicted on October 3, 1985, for first degree aggravated sexual assault, second degree sexual assault and third degree criminal restraint as proscribed, respectively, by *N.J. Stat. Ann.* 2C:14-2a(6); 2C:14-2c(1), and 2C:13-2a. Trial was commenced on May 7, 1986, and the jurors heard testimony on May 8, 12, 13 and the morning of May 14, 1986. It was established by the State of New Jersey, through the testimony of the female victim and eyewitnesses who heard the victim's screams and came to her assistance, that after a casual evening of dancing and drinking, petitioner ripped off the woman's clothes and sexually assaulted her in his automobile; the victim's physical resistance was to no avail, but her screams, whenever petitioner removed his hand from her mouth, and her honking of the car horn eventually attracted the attention of two nearby residents who were able to stop the attack. (Trans. of May 12, 1986, at T13-13 to 20; T14-2 to 23; T15-19 to 23; T16-19 to 17-14; T17-15 to 18-23; T19-12 to 22-19; T22-23 to 23-1; T23-22 to 25-23; T26-3 to 19; T28-11 to 15; T130-14 to 24; T131-17 to 132-24; T133-8 to 137-6; T137-17 to 138-11; T177-6 to 7; T178-23 to 180-20; T181-1 to 183-11).

At the beginning of trial, all 14 empaneled jurors were instructed not to associate with any of the parties, attorneys, or witnesses involved in the trial and not to begin discussions among themselves until the jury panel retired to deliberate. (Trans. of May 7, 1986, at T14-13 to 17-15). The court reiterated these admonitions throughout the trial. (*E.g.*, Trans. of May 7, 1986, at T22-6 to 22; Trans of May 8, 1986, at T81-1 to 6, T160-7 to 18, T161-9 to 162-6; Trans. of

May 12, 1986, at T209-12 to 210-4; Trans. of May 13, 1986, at T240-7 to 21; Trans. of May 14, 1986, at T126-9 to 23). For jury deliberations, two alternates were randomly selected and instructed not to discuss the case with anyone. (Trans. of May 14, 1986, at T156-13 to 23; T160-16 to 161-19). The alternates were thereafter present for any subsequent substantive proceeding involving the court and the jury. (See Trans. of May 14, 1986, at T162-2 to 7, T164-17 to 20; Trans. of May 15, 1986, at T4-4 to 5, T9-25 to 10-2, T12-23 to 25). The court also repeatedly ordered the deliberating jurors not to continue deliberations outside the jury room or discuss the case with anyone else. (Trans. of May 14, 1986, at T165-16 to 168-2; Trans. of May 15, 1986, at T10-12 to 11-14, T15-17 to 17-4).

On the morning of May 16, 1986, before the jurors were to continue their deliberations, defense counsel informed the court that on the evening of May 15, 1986, at a bowling alley, a juror approached Robert Susser, a partner from his office, and said he wanted to ask a legal question. (Trans. of May 16, 1986, at T2-3 to 14). Susser's impression was that the juror wanted to engage in a discussion with him, and the juror simply "smiled" when the attorney inquired if the juror was sitting on a rape case in Monmouth County. (*Id.* at T12-14 to 21). The attorney ended all communication by stating that his office was representing the defendant in that case and there should be no discussion. (*Id.* at T2-21 to 3-4). Another named partner of defense counsel's firm, having also heard the details of the incident from Susser, also appeared before the court; he told the court that the juror was more than "inquisitive" and opined that the incident

"certainly . . . would have an effect on the way the man is thinking." (*Id.* at T3-8 to 4-24). The State requested a *voir dire* of the juror because of the violation of the court's order and the relationship between the juror and the defense attorney's law partner, and also requested that the juror be removed and an alternate selected. (*Id.* at T5-2 to 6-25). The court felt obliged to *voir dire* the juror. (*Id.* at T7-1 to 3). Petitioner's position was that the juror should be disqualified if there is a *voir dire*, that he does "want an alternate in there," but that he also wanted a declaration of mistrial because the entire jury may be "tainted." (*Id.* at T7-4 to 8-21). Upon *voir dire*, the juror testified that he played in the same bowling league as Susser and Susser's father; that he knew Susser was an attorney, but that he did not know, until Susser told him, that Susser was associated with the defense firm; that there were no "inquiries" made by him with respect to "the particular case," in that the juror only said "could I ask you a question" and Susser stopped the conversation, and that the fact of the professional relationship between the defense attorney and a member of the juror's bowling league would not affect his "ability to decide this case on the evidence." (*Id.* at T9-15 to 10-19, T14-20 to 16-1).

Nevertheless, the court exercised its judicial discretion to excuse the juror. (*Id.* at T20-4 to 6). The court concluded that the juror violated an order reiterated many times and based this conclusion on the fact that the juror approached a lawyer he knew and asked a question in such a manner that the lawyer was immediately prompted to inquire whether the juror was sitting on a rape case in Monmouth County.

(*Id.* at T18-5 to 23, T19-21 to 20-2). The court also was troubled by the fact of the relationship between a member of the juror's bowling league and defense counsel. (*Id.* at T19-4 to 8, T20-2 to 4). The court decided to excuse the juror and also denied defendant's motion for a declaration of mistrial for the same reasons. (*Id.* at T20-4 to 25). The juror was thereupon excused. (*Id.* at T21-23 to 22-7).

After ascertaining on the record that the two alternate jurors did not discuss the case, the court had one alternate selected at random to become part of the jury. (*Id.* at T22-14 to 23-8). In accordance with New Jersey Court Rule 1:8-2(d), the court instructed the jurors to "set aside and disregard your past deliberations" (*id.* at T24-15 to 17), begin deliberations anew, as if entering the jury room for the first time after hearing the jury charge (*id.* at T24-17 to 20), and "eliminate any impact Juror No. 4 may have had on your deliberations and consider the evidence in the context of a full and complete deliberations with a new member of your jury." (*Id.* at T24-22 to 25-1). Approximately two hours later, the jurors returned their unanimous verdict convicting petitioner of second degree sexual assault and third degree criminal restraint. (*Id.* at T25-7 to 8; 7T26-1 to 21).¹

On appeal of his convictions to the Superior Court of New Jersey, Appellate Division, petitioner argued as to this issue that the trial court abused its discretion in substituting the alternate juror and refusing

¹ Respondent notes that petitioner's exact time notations circumscribing the jurors' deliberations are not reflected with such specificity in the transcript record of the state court proceedings. The times set forth are not inconsistent with the record, however. Hence, respondent has no serious dispute as to these times.

to declare a mistrial. (Pet. at p. 2a). The Appellate Division determined petitioner's contentions to be "clearly without merit." (Pet. at p. 2a). The appellate court further commented that it was "entirely satisfied that the judge properly exercised his discretion in excusing the sitting juror," and that it was "convinced that the judge conscientiously exercised his discretion by denying defendant's request for a mistrial and substituting the alternate for the sitting juror." (Pet. at pp. 2a, 3a).

In his petition for certification filed in the Supreme Court of New Jersey, petitioner claimed that the juror substitution produced an "unjust result," that *State v. Miller*, 76 N.J. 392, 388 A.2d 218 (1978), and *State v. Corsaro*, 107 N.J. 339, 526 A.2d 1046 (1987), compel a result different from that reached by the Appellate Division, and that the Appellate Division misread *Corsaro* on the "fact sensitive" issue of juror substitution. (Pet. Certification, at pp. 3 to 15). By order filed February 18, 1988, the Supreme Court of New Jersey denied the petition for certification.

Petitioner subsequently sought bail pending his petition for *certiorari*; this application, addressed to Supreme Court Justice William J. Brennan, Jr., was denied on April 15, 1988. Petitioner's petition for writ of federal habeas corpus, filed on May 19, 1988, is currently pending in the United States District Court, District of New Jersey.

REASONS WHY THE PETITION SHOULD BE DENIED

1. This Court is without jurisdiction to grant *certiorari* because to the extent a Sixth Amendment question is raised in the petition, this issue was neither presented to, nor decided by, the state courts as a federal constitutional question.

The questions expressly set out by petitioner at page i of his petition for *certiorari* quite candidly reflect the ultimate questions raised in the state courts in reliance upon three Supreme Court of New Jersey opinions and a court rule. The petition itself arguably seeks to raise a Sixth Amendment claim. (Pet. at pp. 2, 5-6, 13). Indeed, petitioner claims "that the juror substitution in this case violated defendant's federal constitutional guarantee of the right to a fair and impartial trial by jury." (Pet. at p. 13).

It is also clear, however, that petitioner has never raised his complaint in the state courts in federal constitutional terms, and the state courts did not decide a federal question. Hence, whether viewed as a jurisdictional defect or a prudential restraint on this Court's exercise of *certiorari* jurisdiction, petitioner's failure to present his claim to the state courts in federal constitutional terms requires denial of the petition.

"[J]urisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-97 (1981); accord, *Bankers Life and Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1650 (1988). This Court has acknowledged it is "unsettled" whether the

“ ‘not pressed or passed upon below’ ” rule is jurisdictional, *Webb v. Webb*, 451 U.S. at 501-02 (“Because petitioner failed to raise her federal claim in the state court proceedings and the [state] Supreme Court failed to rule on a federal issue, we conclude we are without jurisdiction in this case”), or prudential. *Bankers Life and Casualty Co. v. Crenshaw*, 108 S. Ct. at 1651. However, for reasons of comity and the need for a fully developed state court record, including a reasoned opinion on the merits, the “minimum” requirement for exercise of *certiorari* jurisdiction is that “there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.” *Webb v. Webb*, 451 U.S. at 501. Petitioner bears the burden of establishing the jurisdiction of this Court. *Michigan v. Long*, 464 U.S. 1032, 1042 n.8 (1983). Indeed, by rule of this Court, a petitioner seeking *certiorari* review of a state court judgment must specify at what point in the proceedings the federal question sought to be reviewed was raised, as well as the manner and method of raising the claim and the way in which the state court passed upon the issue “to show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of *certiorari*.” *Sup. Ct. R.* 21.1(h).

The state court record does not support a conclusion that the federal Sixth Amendment question was raised and/or passed upon in the state courts. As earlier noted, petitioner alleged to the Superior Court, Appellate Division, that the trial court abused its dis-

cretion under *N.J. Ct. R. 1:8-2(d)* in discharging the juror and thereafter substituting an alternate during deliberations, in lieu of declaring a mistrial. (Petitioner's brief to App. Div. at pp. 41-47). Petitioner cited *State v. Trent*, 79 N.J. 251, 398 A.2d 1271 (1979) (failure to instruct jurors, after juror substitution, to begin deliberations anew is reversible error), in support of his factual contention that notwithstanding the strong admonitory instructions to this effect, the amount of time eventually spent reaching the verdict indicated no possibility of new deliberations. Petitioner in a supplemental letter relied upon *State v. Corsaro*, 107 N.J. 339, 526 A.2d 1046 (1987) (holding that in the unusual factual circumstances of that case—where partial verdicts on inter-related charges indicating preliminary fact-finding regarding the still “open” charges were already returned when a juror was discharged and an alternate selected—substitution pursuant to *N.J. Ct. R. 1:8-2(d)* was “plain error”). Petitioner did not alert the Appellate Division to a claim of federal constitutional dimension. Indeed, a review of petitioner's argument reveals only one reference to a “right to a jury trial.” (Petitioner's brief to the App. Div. at p. 47). It is not clear that this brief allusion was intended to constitute a constitutional claim and it is equally unclear whether petitioner was referring to a state or federal “right.” See *Bankers Life and Casualty Co. v. Crenshaw*, 108 S. Ct. at 1650. The Appellate Division opinion surely does not reflect the determination of a federal question. (Pet. at pp. 1a to 3a).

Nor does the petition for certification support a finding that petitioner raised the issue in the state supreme court. In his application to the state supreme

court, petitioner acknowledged that the court rule was held constitutional in *State v. Miller*, 76 N.J. 392, 388 A.2d 218 (1978) (where the state supreme court concluded that the substitution rule “does not offend our constitutional guaranty of trial by jury”), and merely sought to place his case factually within the *Miller* proviso that in some circumstances the presumption that the reconstituted jury adhered to admonitory instructions to begin deliberations anew may be untenable.

Accordingly, it must be concluded that petitioner has failed to establish that *certiorari* jurisdiction should be exercised in this case. He has not pressed upon the state courts a Sixth Amendment claim; nor does the final state court judgment implicate a federal question. 28 U.S.C. sec. 1257(3). Respondent urges this Court to deny *certiorari* herein.

2. The state appellate court fully considered the issues raised by petitioner and correctly applied the law of New Jersey.

The Superior Court, Appellate Division, correctly applied the applicable state law, that is, the court rule and *State v. Miller*, 76 N.J. 392, 388 A.2d 218 (1978), in concluding that the trial court did not abuse its discretion in discharging a deliberating juror, substituting an undischarged alternate after ascertaining on the record that he had not discussed the case, and forcefully instructing the jurors to reject all prior deliberations and to begin deliberations anew. See N.J. Ct. R. 1:8-2(d). That the jurors followed the instruction is apparent, especially since the evidence of petitioner’s guilt—to which he had interposed the defense of denial that any sexual activity, assaultive or not, occurred—was overwhelming and the reconsti-

tuted jury deliberated slightly more than two hours on the charges. Two hours cannot be considered evidential of non-renewal of deliberations as it was long enough to assess credibility and make factual determinations arising from a non-complex trial involving three and one-half days of testimony. The state court's appellate determination in this regard, therefore, does not implicate an issue of substance for this Court to decide. The state court judgment is a simple application of New Jersey precedent that is not inconsistent with legal principles developed by other courts. See *Peek v. Kemp*, 784 F.2d 1479 (11th Cir.), cert. denied, 107 S. Ct. 421 (1986), reh'g denied, 107 S. Ct. 912 (1987); *United States v. Hillard*, 701 F.2d 1052 (2d Cir. 1983), cert. denied, 461 U.S. 958 (1983); *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981), cert. denied, 457 U.S. 1136, 459 U.S. 906 (1982); *Perry v. State*, 255 Ga. 490, 339 S.E.2d 922, 924-25 (1986); *State v. Haislip*, 237 Kan. 461, 701 P.2d 909, cert. denied, 474 U.S. 1022 (1985); *State v. Dodis*, 314 N.W.2d 233 (Minn. 1982).

CONCLUSION

Respondent submits that the petition for *certiorari* must be denied because of petitioner's failure to raise a federal question in the state courts. In any event, the judgment of the Superior Court, Appellate Division, does not warrant review because it was merely a correct application of controlling state law on a fact-sensitive issue.

Respectfully submitted,

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